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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

V.

Dionicio Cardenas and Dulce Maria
Espinoza-Sanchez,

Defendants.

CR-00-1093-PHX-ROS

Order

15 Defendant Espinoza-Sanchez ("Espinoza-Sanchez") filed a Motion to Suppress
16 Evidence and a Motion to Suppress Statements on January 12, 2001. Defendant Cardenas
17 ("Cardenas") joined in both Motions. A hearing on the Motions occurred on February 26,
18 March 7, and April 27, 2001.

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Background¹

21 At approximately 12:33 a.m. on September 11, 2000, officer Lionel Bruce Poolaw,
22 r., ("Poolaw") of the Colorado River Indian Tribes Police Department observed a van driven
23 y Cardenas traveling along Highway 95 in Parker, Arizona? Poolaw, who was traveling in

24 ¹ This Background section is derived from the uncontroverted testimony presented
25 at the hearing on the Motions.

26 ² The chronology of events, as presented at the hearing, ~~was~~ somewhat amorphous
27 and difficult to discern. However, the Court has carefully reviewed the transcript and to a
28 large extent has been able to piece together the order of events.

There are some inconsistencies in Poolaw's testimony. For example, there are

1 the direction opposite the van, believed that the van was exceeding the posted speed limit.
2 After visually estimating the van's speed to be **45 m.p.h.** and taking a radar measurement,
3 which showed that the van was traveling **43 m.p.h.**, the officer turned his patrol car around
4 and began to follow the van. Shortly thereafter, Poolaw initiated a traffic stop on the basis
5 that the van was traveling **43 m.p.h.** in a **35 m.p.h.** zone.

6 After initiating the stop, Poolaw approached the driver side of the van. Using a
7 flashlight, he could see into the rear of the van. He did not see any luggage in the van. When
8 he reached the window next to the driver, Poolaw detected a slight scent of perfume, and he
9 observed deodorizers in the vehicle.

10 Poolaw asked Cardenas where he was coming from and where he was heading.
11 Cardenas responded that he was coming from Phoenix and going to **Los Angeles**.³ Poolaw
12 then asked Cardenas for his driver's license, registration, and proof of insurance. Cardenas
13 produced a driver's license and registration, but he had no proof of insurance. The name on
14 the registration did not match the name on the driver's license, **so** Poolaw asked Cardenas to
15 step out of the van to the rear of the vehicle. Poolaw asked Cardenas to explain why the
16 registration was not in his name, and Cardenas replied that he had just purchased the vehicle
17 and had not had time to register it.

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19 inconsistencies regarding the exact location of the van when Poolaw first saw it. At first,
20 Poolaw testified that the van **was** just before, or right at, a road sign lowering the speed limit
21 to **35 m.p.h.** (See Reporter's Transcript ("R.T.") at **33-34**). However, he later testified that
22 he first saw the van when it was between the **45 m.p.h.** sign and the **35 m.p.h.** sign, and he
23 obtained his first radar measurement of the van's speed at that time. (See id. at **35-36, 40, 68-**
24 **69**). He later testified that he first turned on the radar after the vehicle had passed the **35**
25 **m.p.h.** sign. (Id. at 69). He subsequently testified that when he first saw the van, it was 150
26 to 200 feet **from** the **35 m.p.h.** sign, but that he first obtained a radar measurement of the
27 van's speed after it entered into the **35 m.p.h.** zone. (Id. at **140-41**).

28 ³ It is unclear whether Poolaw asked Cardenas this question before requesting the
driver's license, registration, and proof of insurance, or whether this question **was** posed after
Poolaw asked Cardenas to step out of the vehicle. At first, Poolaw testified that he asked the
question when Cardenas was still in the vehicle. (See R.T. at 11-12). However, he later
testified that he asked the question after Cardenas **stepped** to the rear of the vehicle.' (See id.
at 78).

1 After talking to Cardenas at the rear of the van, it became apparent to Poolaw that
2 Cardenas had difficulty understanding English. Approximately ten minutes into the stop,
3 Poolaw then went to his patrol unit to check on the driver's license and registration. Poolaw
4 learned that there were no warrants outstanding for Cardenas, and the van was not listed as
5 stolen. Poolaw requested that an interpreter be sent to the site of the stop. An interpreter
6 arrived within ten minutes.

7 During the traffic stop, Poolaw observed items in the van and smelled particular scents
8 which caused him to believe that the van might contain illegal drugs. Poolaw testified that
9 he smelled faint perfume and saw deodorizers when he first approached the vehicle from the
10 driver side. After he called for an interpreter, Poolaw made contact with the passenger,
11 Espinoza-Sanchez. At that time, he noticed a strong scent of perfume, and he observed an
12 open bottle of perfume on the dashboard. With his flashlight, Poolaw was able to see a box
13 of Tide detergent, a box of fabric softener sheets, and air deodorizers in the van, including
14 a deodorizer affixed to the gear shifter. Poolaw suspected that these items were being used
15 to mask the scent of illegal drugs. In addition, Poolaw testified that Highway 95 "is a major
16 drug route." However, Poolaw did not feel he possessed probable cause to search the
17 vehicle.

18 After the interpreter, Ruben Villafana, arrived, Poolaw asked Villafana to verify the
19 passenger's name and date of birth. Villafana then asked Cardenas to state who owned the
20 vehicle, where he was coming from, and where he was headed. Cardenas responded that he
21 owned the van and that he was coming from Phoenix and heading to Los Angeles. Villafana
22 next asked Cardenas how long he had been in Phoenix, and Cardenas responded that he had
23 been there since Friday. Villafana then asked Espinoza-Sanchez to state where they were
24 coming from and where they were headed. She responded that they were coming from
25 Phoenix, where they had been since Saturday night, visiting her cousin, and they were on
26 their way to Los Angeles and Parker. At Poolaw's direction, Villafana then asked Cardenas
27 for consent to search the van, and Cardenas consented.

28 Poolaw immediately conducted a search of the van and found cocaine. Some of the

1 drugs were wrapped in sheets of fabric softener. During the search, Poolaw used a police
2 dog which had been present in his patrol unit from the inception of the stop. Poolaw would
3 have conducted the search without the dog because the dog was not certified, but he **used** the
4 dog for training purposes.

5 **Discussion**

6 **I. Validity of Traffic Stop**

7 Defendants contend that the traffic stop was illegally executed. Plaintiff contends that
8 the traffic stop was valid because Poolaw observed Cardenas commit a traffic violation.

9 This traffic stop was initiated solely because Poolaw believed the van was speeding
10 and not because Poolaw suspected that the occupants of the van had committed a non-traffic
11 offense. It therefore appears that probable cause was required to initiate the stop. See Whren
12 v. United States, 517 U.S. 806, 810 (1996). In Whren, the Supreme Court stated that "[a]s
13 a general matter, the decision to stop an automobile is reasonable where the police have
14 probable cause to believe that a traffic violation has occurred." In a subsequent opinion, the
15 Supreme Court again referred to the probable cause requirement, stating: "In Whren, we held
16 that an individual officer's subjective intentions are irrelevant to the Fourth Amendment
17 validity of a traffic stop that is justified objectively by probable cause to believe that a traffic
18 violation has occurred." City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 456
19 (2000). Likewise, in their dissenting opinion in Edmond, 121 S. Ct. at 459, Chief Justice
20 Rehnquist and Justices **Thomas** and **Scalia** explained the holding in Whren as follows: "The
21 reasonableness of an officer's discretionary decision to stop an automobile, at issue in
22 Whren, turns on whether there is probable cause to believe that a traffic violation has
23 occurred." To be constitutionally permissible, a traffic stop must "not be 'unreasonable'
24 under the circumstances[.]" and the subjective intentions of police officers play no role in
25 determiniig whether a traffic stop is permitted by the Fourth Amendment. Whren, 517 U.S.
26 at 810, 813.

27 Several Ninth Circuit decisions suggest that only reasonable suspicion is required to
28 initiate a traffic stop. See United States v. Lopez-Soto, 205 F.3d 1101, 1104 (9th Cir. 2000)

(reasonable suspicion required for investigatory traffic stop, and there was no reasonable suspicion); see also United States v. Sigmond-Ballesteros, 247 F.3d 943, 947 (9th Cir. 2001) (With respect to an investigatory stop, "[a]n officer may not detain a motorist without a showing of a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'"); United States v. Twilley, 222 F.3d 1092, 1095 (9th Cir. 2000) (finding no reasonable suspicion). In Lopez-Soto, which was decided more than eight months before the Supreme Court rendered its opinion in Edmond, the Ninth Circuit stated

Prior to Whren, it was settled law that reasonable suspicion is enough to support an investigatory traffic stop. . . . We do not believe that the Court in Whren intended to change this settled rule. The passage on which Lopez-Soto relies tells us only that probable cause is sufficient to support a traffic stop, not that it is necessary. . . . [W]e do not believe that the casual use of the phrase 'probable cause' was intended to set a new standard.

205 F.3d at 1104. More recently, the Ninth Circuit identified the applicable standard as "whether [the officer] had reasonable suspicion to believe that [the defendant] had violated a traffic law." United States v. King, 244 F.3d 736, 738 (9th Cir. 2001). However, in United States v. Wallace, 213 F.3d 1216, 1218, 1219 (9th Cir.), cert. denied, 121 S.Ct. 418 (2000), the Ninth Circuit characterized Whren as "[holding] that law enforcement agents conducting pretextual traffic stops must have probable cause to believe that a traffic violation occurred in order to detain a vehicle." However, in a footnote, the Wallace court declined to address whether reasonable suspicion was the appropriate standard because there was probable cause to support the stop. Id. at 1219n.3; but see United States v. Garcia, 205 F.3d 1182, 1186-87 (9th Cir.), cert. denied, 121 S. Ct. 138 (2000) ("If the officer had probable cause to believe that a traffic violation had occurred, the seizure is reasonable.") citing Whren).

Like the Wallace court, this Court finds that it is unnecessary to resolve whether probable cause or reasonable suspicion was required, because the Court concludes that there was probable cause to initiate the stop. Poolaw testified several times that he obtained a radar measurement of the van's speed after it had entered into the 35 m.p.h. zone, and that

1 measurement indicated that the van was traveling at 43 m.p.h.⁴ Probable cause exists to stop
2 a vehicle for a speeding violation if the vehicle is exceeding the posted speed limit. See
3 Sigmond-Ballesteros, 247 F.3d at 948; see also State v. Ossana, 199 Ariz. 459, 18 P.3d
4 1258, 1259 (Ariz. App. 2001) (officers reasonably believed a traffic violation had been
5 committed where the defendant was seen driving faster than the posted speed limit).
6 Accordingly, the Court concludes that the traffic stop was valid.

7 **II. Validity of Detention and Search**

8 Defendants contend that Poolaw exceeded the proper scope of the detention in
9 various respects. In particular, they assert that Poolaw asked questions that did not relate to
10 the purpose of the stop, and they were detained for an unreasonable length of time without
11 probable cause. They also claim that Poolaw did not possess probable cause to search the
12 van.

13 Once a vehicle is lawfully stopped on the basis that a traffic violation has been
14 committed, a seizure occurs pursuant to Terry v. Ohio, 392 U.S.1 (1968), if the officer
15 detains the occupants of the vehicle "longer than is necessary to effectuate the purpose of
16 the stop." Florida v. Royer, 460 U.S.491,500 (1983) (plurality opinion). At the time of
17 such a seizure, the officer must possess a "reasonable suspicion" that a crime has been
18 committed, or the seizure is unlawful. See Sigmond-Ballesteros, 247 F.3d at 946-52.
19 "Reasonable suspicion must be founded upon a particularized and objective basis for
20 suspecting the particular person stopped of criminal activity." Id. at 952 (internal quotes and
21 cite omitted).

22 In this case, Poolaw had accumulated and possessed a reasonable suspicion that the
23 van contained illegal drugs based upon the indicators before him: the presence of
24 deodorizers, the scent of perfume, the open bottle of perfume on the dashboard, the box of
25 fabric softener sheets, the Tide detergent, the absence of luggage, and the fact that Highway

27 ⁴ Although Poolaw testified once on cross that he clocked the vehicle at 43 m.p.h.
28 before it entered the 35 m.p.h. zone, he corrected himself, consistent with his direct
testimony, that he took the measurement after the van entered into the 35 m.p.h. zone.

1 95 is a "major drug route." The question thus presented is whether the stop was so long in
2 duration that it no longer constituted an investigative stop. Although there is "no rigid time
3 limitation" on investigative stops, "if an investigative stop continues indefinitely, at some
4 point it can no longer be justified as an investigative stop." United States v. Sharpe, 470
5 U.S. 675, 685 (1985).

6 In assessing whether a detention is too long in duration to be justified as an
7 investigative stop, we consider it appropriate to examine whether the police
8 diligently pursued a means of investigation that was likely to confirm or dispel
9 their suspicions quickly, during which time it was necessary to detain the
10 defendant. A court making this assessment should take care to consider
11 whether the police are acting in a swiftly developing situation, and in such
12 cases the court should not indulge in unrealistic second-guessing. A creative
13 judge engaged in post hoc evaluation of police conduct can almost always
14 imagine some alternative means by which the objectives of the police might
15 have been accomplished. But "[t]he fact that the protection of the public
16 might, in the abstract, have been accomplished by 'less intrusive' means does
17 not, itself, render the search unreasonable." The question is not simply
18 whether some other alternative was available, but whether the police acted
19 unreasonably in failing to recognize or to pursue it.

20 Id. at 686-87 (cites omitted) (upholding a 20-minute detention); see also Garcia, 205 F.3d
21 at 1187 (delay for a "short period of time" in which a "brief conversation" conversation
22 occurred did not render detention unreasonable); United States v. Fouche, 776 F.2d 1398,
23 1403 (9th Cir. 1985) (common traffic violation permits a "brief investigatory stop").

24 The Court finds that the vehicle was not detained for an unreasonable period of time.
25 According to the testimony presented, the interpreter, Villafana, arrived approximately
26 twenty minutes after the stop was initiated. At that point, Villafana presented a few
27 questions to Cardenas and Espinoza-Sanchez, following which he asked Cardenas if he
28 would consent to a search of the van. A search was conducted immediately thereafter, and
during the course of that search, Poolaw discovered that the van contained illegal drugs.

The Court also finds that the questions presented by Poolaw and by Villafana did not
exceed the scope of the detention. The means of investigation pursued by Poolaw "was
likely to confirm or dispel" his suspicions quickly, and it was reasonable for Poolaw to call
on an interpreter to assist in this regard, because Cardenas spoke little English and Espinoza-
Sanchez spoke none. See Sharpe, 470 U.S. at 686.

1 The sole question remaining is whether Cardenas' consent to a search of the van was
2 valid. Defendants contend that Cardenas' consent was not freely and voluntarily given.

3 "In order to establish the validity of a consent to search, the government bears the
4 heavy burden of demonstrating that the consent was freely and voluntarily given." United
5 States v. Chan-Jimenez, 125 F.3d 1324, 1327 (9th Cir. 1997) (citing Schneckloth v
6 Bustamonte, 412 U.S. 218, 222 (1973)). The Court must evaluate the totality of the
7 circumstances when determining whether consent was validly given. Chan-Jimenez, 125
8 F.3d at 1327.

9 Among the factors that tend to show a lack of voluntariness are: (1) the person
10 was in custody; (2) the officer had his weapon drawn; (3) the officer failed to
11 administer Miranda warnings; (4) the officer did not inform the person of his
right to refuse to consent; and (5) the person was told that a search warrant
could be obtained,

12 Id. None of these factors, however, is dispositive of the voluntariness inquiry. Id. at 1327
13 n.3. In addition, the Supreme Court has held that a lawfully seized defendant does not need
14 "to be advised that he is 'free to go' before his consent to search will be recognized as
15 voluntary." Ohio v. Robinette, 519 U.S. 33, 35 (1996).

16 The Court finds that at the time Cardenas consented to the search of the van, he was
17 "in custody" for all practical purposes. Although persons temporarily detained during routine
18 traffic stops are not "in custody" for purposes of Miranda, Defendants were subjected to
19 treatment which rendered them "in custody" for practical purposes. See Berkemer v
20 McCarty, 468 U.S. 420, 440 (1984). The fact that Poolaw asked Cardenas to step out of the
21 vehicle did not alone cause Cardenas to be in custody. See Pennsylvania v. Mims, 434 U.S.
22 106, 109-11 (1977) (an officer may ask a driver to step out of the vehicle, even in the absence
23 of any suspicion). However, Cardenas' driver's license was taken by Poolaw, and a
24 reasonable person under Cardenas' circumstances could not have felt free to leave until his
25 license had been returned to him. See United States v. Doe, 219 F.3d 1009, 1014 (9th Cir.
26 2000) (a person is "in custody" if a "reasonable person 'would have believed that he was not
27 free to leave.'" (cite omitted). In addition, Cardenas was not advised of his Miranda rights
28 prior to consenting to the search.

1 No evidence was presented at the hearing to suggest that Poolaw had his weapon
2 drawn at the time Cardenas consented to the search. Cardenas was not told, however, that
3 he could refuse to consent to a search, nor was he told that a search warrant could be
4 obtained.'

5 Nevertheless, the uncontroverted testimony presented at hearing indicates that
6 Cardenas told the interpreter that the officers "could go ahead and search" the van and that
7 Cardenas "had no problem with it." (R.T. at 163). Cardenas also said that the officers
8 "weren't going to find anything." (*Id.*). It appeared to Villafana and the Court finds that
9 Cardenas understood everything Villafana was asking him. (*Id.*). The Court finds that
10 Cardenas freely and voluntarily consented to the search of the van. See Chan-Jimenez, 125
11 F.3d at 1327.

12 **III. Statements**

13 Defendants seek to hold Plaintiff to its burden of establishing that the statements made
14 by Defendants were not obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966).
15 In particular, Defendants challenge whether the statements made during the field detention
16 and the statements made eight hours later to DEA agents were obtained in violation of
17 Miranda.

18 It is well established that "the prosecution may not use statements, whether
19 exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless
20 it demonstrates the use of procedural safeguards effective to secure the privilege against
21 self-incrimination." Miranda, 384 U.S. at 444. Custodial interrogation means "questioning
22 initiated by law enforcement officers after a person has been taken into custody or otherwise
23 deprived of his freedom of action in any significant way." *Id.* The Miranda decision
24 requires that prior to any questioning, law enforcement officers must warn the person in
25 custody that he has the right to remain silent, that any statements he makes may be used as
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27 ⁵
28 Because Poolaw opined that he did not have probable cause to search the van, it is
not expected that he would have warned Cardenas that a warrant could be obtained.

1 evidence against him, and that he has the right to an attorney, retained or appointed. *Id.*

2 Once warnings have been given, the subsequent procedure is clear. If the
3 individual indicates in any manner, at any time prior to or during questioning,
4 that he wishes to remain silent, the interrogation must cease. At this point he
5 has shown that he intends to exercise his Fifth Amendment privilege; any
statement taken after the person invokes his privilege cannot be other than the
product of compulsion, subtle or otherwise. . . . If the individual states that he
wants an attorney, the interrogation must cease until an attorney is present.

6 *Id.* at 473-74. "Any statement given freely and voluntarily without any compelling influences
7 is, of course, admissible in evidence." *Id.* at 478.

8 Not all statements obtained by the police after a person has been taken into custody
9 are the product of interrogation. Rhode Island v. Innis, 446 U.S. 291, 299 (1980). Rather,
10 interrogation "must reflect a measure of compulsion above and beyond that inherent in
11 custody itself." *Id.* at 300. "[T]he term 'interrogation' under Miranda refers not only to
12 express questioning, but also to any words or actions on the part of the police (other than
13 those normally attendant to arrest and custody) that the police should know are reasonably
14 likely to elicit an incriminating response from the suspect." *Id.* at 301.

15 The Court finds that the statements made during the field detention were the product
16 of custodial interrogation. Defendants were in custody, because a reasonable person under
17 the circumstances would not have felt free to go. See discussion supra at 8. Because
18 Defendants were not advised of their rights under Miranda before Poolaw presented
19 questions to them, the Court will suppress all statements made by Defendants to Poolaw
20 during the traffic stop. This determination is independent of the Court's finding regarding
21 the validity of Cardenas' consent to a search of the vehicle as set forth above.

22 The Court also finds that the statements made to the DEA agents after Defendants
23 were arrested were made after Miranda warnings were given by Detective Moran and were
24 given freely and voluntarily, without any compelling influences. These statements were not
25 tainted by the pre-arrest statements obtained in violation of Miranda, because the pre-arrest
26 statements were not accompanied "by actual coercion or other circumstances calculated to
27 undermine the [Defendants'] ability to exercise [their] free will[.]" Oregon v. Elstad, 470
28 U.S. 298, 309 (1985). Absent such coercion or other circumstances, "the admissibility of any

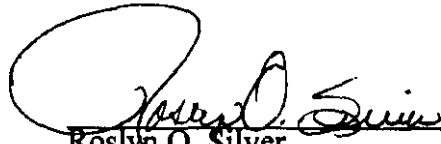
1 subsequent statement should turn . . . solely on whether it is knowingly and voluntarily
2 made." Id. After being advised of his **rights**, Cardenas agreed to answer further questions.
3 and he did not state that he wanted an attorney. Similarly, after she ~~was~~ advised of her **rights**.
4 Espinoza-Sanchez indicated that she was willing to answer questions, and she did not state
5 that she wanted an attorney. Because these post-arrest statements were knowingly and
6 voluntarily made, they will not be suppressed. See id.

7 Accordingly,

8 **IT IS THEREFORE ORDERED** that Defendants' Motion to Suppress Evidence is
9 **DENIED.**

10 **IT IS FURTHER ORDERED** that Defendants' Motion to Suppress Statements is
11 **GRANTED** with respect to the pre-arrest statements and **DENIED** with respect to the post-
12 arrest statements.

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14 DATED this 5 day of June, 2001.

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18 Roslyn O. Silver
United States District Judge
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